Editor's note: 82 I.D. 123; Appealed -- aff'd, Civ. No. 1-75-75 (D. Idaho Nov. 6, 1979), aff'd, No. 80-3011 (9th Cir. Aug. 3, 1981)

UNITED STATES

v.

GOLDEN GRIGG, ET AL.

IBLA 73-274 Decided April 7, 1975

Appeal from decision of Administrative Law Judge Robert W. Mesch canceling fourteen desert land entries.

Affirmed.

1. Desert Land Entry: Generally -- Act of March 3, 1891 -- Words and Phrases

Section 7 of the Act of March 3, 1891, provides that no person or association of persons shall hold by assignment or otherwise, prior to the issue of patent, more than 320 acres of arid or desert lands; the terms "hold," "assignment"

and "otherwise" are words of broad significance and will be defined in such manner to effectuate the purposes of the Act, to wit, to prevent anyone from holding more than 320 acres of desert lands to the exclusion of bona fide settlers or the entrymen of record.

2. Desert Land Entry: Generally -- Act of March 3, 1891 -- Words and Phrases

Any person or association of persons who controls, possesses and receives substantial benefits from desert lands will be regarded as "holding" such lands within the meaning of the Act of March 3, 1891.

3. Desert Land Entry: Cancellation

Any desert land entry made for the use and benefit of others with intent to circumvent the provisions of the desert land laws must be regarded as fraudulent and will be canceled.

APPEARANCES: Riley C. Nichols, Esq. and William Burpee, Esq., United States Department of the Interior, Boise, Idaho, for appellee; William F. Ringert, Esq., Anderson, Kaufman, Anderson and Ringert, Boise, Idaho, for appellants.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Golden Grigg and 13 other desert land entrymen 1/ have appealed from the November 27, 1972, decision of Administrative Law Judge Robert W. Mesch, which canceled all 14 of their desert land entries for "illegal inception" and "failure to comply with the requirements of law."

The Desert Land Act of 1877, as amended, 43 U.S.C. §§ 321-329 (1970), provides that an American citizen, 21 years of age, may

1/

Appellant	desert land entry
Golden Grigg	Idaho 013917
LeFawn Grigg	013918
Fred Baines	013919
Otis H. Williams	013920
Kathryn Williams	013921
Lovell Taylor	013922
William A. Anderson	013923
Saragene Smith	013924
Thomas M. Anderson	013925
Bonnie Anderson	013926
Charles L. Taylor	013927
Darlene Baines	013928
Lu Ann Hogg	013933
Paul R. Hogg	013934

enter up to 320 acres of desert land and, after meeting certain cultivation and irrigation requirements, may obtain patent to the land. One of the express limitations on entries is contained in 43 U.S.C. § 329 (1970), which provides in part that "no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands." A further limitation found in 43 U.S.C. § 329 (1970) provides in part that no assignment to or for the benefit of any corporation shall be authorized or recognized.

The Bureau of Land Management (BLM) initiated contest proceedings against these entries on July 14, 1967, by issuing complaints charging in each case that:

(a) Application for entry was not made in good faith in that the contestee had no intent to reclaim, irrigate, and cultivate the land for his own use and benefit as required by Section 1 of the Act of March 3, 1877, 19 Stat. 377, 43 U.S.C. Sec. 321.

(b) The contestee entered into agreements whereby others held his entry, together with other desert land entries, in an aggregate of more than 320 acres in violation of Section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. Sec. 329.

(c) The contestee did not reclaim, irrigate, and cultivate the entry land as required by Section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. secs. 328, 329.

(d) The contestee entered into arrangements whereby his entry was assigned to and for the benefit

> of a copartnership in violation of Section 2 of the Act of March 28, 1908, 35 Stat. 52, 43 U.S.C. sec. 324.

After lengthy hearings Judge Mesch found that the entries had been held by a partnership in violation of 43 U.S.C. § 329 (1970), which prohibits any person or association of persons from holding more than 320 acres of desert land by assignment or otherwise.

Judge Mesch also entered a finding that the entries were not made in good faith and were fraudulent:

> If a disclosure had been made to the Land Office that the individual entrymen were not the sole parties in interest and that the individual entrymen did not intend to reclaim the land for their own use and benefit, the Land Office could not properly have allowed the entries. The courts have consistently held that a failure to disclose facts which, if disclosed, would result in a denial of a grant under the Public Land Laws renders the obtaining of the grant fraudulent. United States v. Trinidad Coal & Coking Company, 137 U.S. 160 (1890); United States v. Keitel, 211 U.S. 370 (1908). (Dec. at 47)

Finally, Judge Mesch found that the entries had not been assigned in violation of 43 U.S.C. § 324 (1970).

Appellants attack the finding by Judge Mesch that the entries were held by a partnership and not by the entrymen. Essentially,

they assert that the prohibition against holding "by assignment or otherwise" prohibits holding only in the sense of holding or obtaining title, and not the holding of a lesser interest. Consequently, appellants assert, there could be neither bad faith nor fraud since even if the BLM had known all the facts, they should have allowed the entries.

Alternatively, appellants argue, the government is estopped from applying what the appellants assert is a new interpretation of law.

At the outset of his opinion Judge Mesch set forth the various interrelationships among the entrymen, the Grigg and Anderson partnership and others. To avoid confusion, we adopt that approach.

The entrymen, their relationship to each other and their connection with the partnership known as Grigg and Anderson Farms are as follows:

Golden Grigg	-- a partner in Grigg and Anderson Farms.
LeFawn Grigg	-- Golden Grigg's wife.
Fred Baines	-- Golden Grigg's son-in-law.
Darlene Baines	-- Fred Baines' wife and Golden Grigg's daughter.

Otis Williams	-- a partner in Grigg and Anderson Farms.
Kathryn Williams	-- Otis Williams' wife and Golden Grigg's sister.
Charles Taylor	-- Otis Williams' son-in-law
Lovell Taylor	-- Charles Taylor's wife and Otis Williams' daughter.
William Anderson	-- Vanness Anderson's son. Vanness Anderson is a partner in Grigg and Anderson Farm
Bonnie Anderson	-- William Anderson's wife.
Paul Hogg	-- Vaness Anderson's son-in-law
Lu Ann Hogg	-- Paul Hogg's wife and Vaness Anderson's daughter.
Saragene Smith	-- Ray Anderson's daughter. Ray Anderson is a partner in Grigg and Anderson Farms.
Thomas Anderson	-- Albert Anderson's son. Albert Anderson is a partner in Grigg and Anderson Farms.

Jack Anderson and his wife, Marilyn, were in the initial group of entrymen. Jack Anderson was killed in an automobile accident in 1964. In December of 1964 his entry was assigned to Thomas Anderson, his brother, and Marilyn Anderson's entry was assigned to Saragene Smith. Jack Anderson was Albert Anderson's son.

Grigg and Anderson Farms is a copartnership of six persons, three related to the Griggs and three related to the Andersons.

On the Grigg side are two brothers, Nephi Grigg and Golden Grigg, and their brother-in-law, Otis Williams. On the Anderson side are three brothers: Vanness, Ray, and Albert. The partnership was formed in 1958 or 1959 and has engaged in extensive development of new lands and in farming. One of the most important functions of the partnership has been the procurement of large quantities of potatoes for Ore-Ida Foods, Inc. Golden Grigg and Vanness Anderson are primarily responsible for the conduct of the partnership's business.

Ore-Ida Foods, Inc., is a food processing corporation controlled by the six members of the Grigg and Anderson partnership from 1953 to 1967. The members of the partnership were the principal stockholders until 1967 when Ore-Ida was acquired by H. J. Heinz Corp. Nephi Grigg served as president and Golden Grigg, Otis Williams, and Vanness Anderson served as vice presidents. Golden Grigg took care of potato procurement; Vanness Anderson supervised the corporation's farming activities; and Otis Williams was in charge of production at the corporation's three plants in Idaho, Oregon and Michigan.

G. T. "Bud" Newcomb is an irrigation engineer and irrigation pipe salesman, who has worked closely with the Grigg and Anderson partnership in developing new lands and constructing irrigation systems.

Anderson Brothers is a copartnership of Vanness, Ray, and Albert Anderson which is engaged in farming operations. Land Creek Farms is a copartnership of Nephi Grigg, Golden Grigg and Otis Williams which is also engaged in farming.

Harley McDowell is president of Idaho Land & Appraisal Service, a private organization which performs a variety of real estate services for clients including mapping, appraising, filing land applications and general consulting services (Tr. 918).

On February 25 and 27, 1963, applications to enter 14 parcels of land containing 4,458 acres were submitted to the Idaho State Office, Bureau of Land Management. The applications and initial filing fee of 25 cents per acre were submitted by Idaho Land & Appraisal Service for each one of the 14 entrymen.

Each application contained statements indicating that the individual entrymen had a permanent right to sufficient water to irrigate the crops to be grown on his entry. According to material submitted with the applications, each entryman claimed ownership of stock in the Cottonwood Mutual Canal Company. The Company was to be responsible for the construction of irrigation facilities to provide water for each entryman.

On March 5, 1963, officials of the BLM met with Golden Grigg and Vanness Anderson to determine what further information needed to be submitted to the BLM before the 14 entries could be allowed. First, it was agreed that documentation of the exact relation between the Cottonwood Mutual Canal Company and the individual entrymen would have to be submitted. Second, a report would have to be submitted showing the economic and engineering feasibility of the proposed project. Third, it would be necessary for the entrymen to reimburse the BLM for prior expenditures for improvement of the range.

The feasibility report and the documents relating to the Cottonwood Mutual Canal Company were submitted some two months later. (Ex. G-24.)

The feasibility plan called for pumping water from the Snake River onto Black Mesa. From there, water was to be delivered to 13 of the 14 entries by an open-ditch gravity system; the remaining entry was to be irrigated by a sprinkler system. The cost per acre for each entry was estimated to be $92.25.

The documents relating to Cottonwood Mutual Canal Company (Ex. G-24) called for each entryman to purchase one share of stock at $100 per share for each irrigable acre of land. The payments were to be in ten equal, annual installments, with the first payment due

when the entries were allowed by the BLM. In order to secure payment for the stock, the company required each entryman to mortgage his entry to the Company.

On behalf of the entrymen, Idaho Land and Appraisal Service submitted a check to the BLM to pay for the prior range improvements.

On the basis of the foregoing submissions, the BLM allowed the entries in February 1964. However, there is a plethora of facts, which, if known to the BLM at the time the entries were allowed, would necessarily have resulted in rejection of the applications to enter. The circumstances surrounding each of the aforementioned submissions clearly show that the entire series of transactions, from the beginning to the present, are an elaborate device to circumvent the law. Further, it is clear that the entries were made for the primary benefit of the Grigg and Anderson Farms partnership, with a secondary benefit running to the individual entrymen. A recapitulation of the submissions to the BLM, in the context in which they occurred, will clearly show that the entrymen were making the entries principally for the use and benefit of the partnership.

Several of the entrymen involved in these proceedings had attempted to enter other desert lands in a nearby area of Idaho. Applications to enter the area had been filed with the BLM in 1960.

The Cottonwood Mutual Canal Company was formed at this time. Eventually, State water permits for some of the applicants were obtained. At one time Golden Grigg had considered the possibility of having the entries assigned to Idaho Industries, a predecessor of Ore-Ida Foods, Inc. After Mr. Grigg's attorney advised him that any such plan was contrary to the law, he decided not to pursue it. The water permits were assigned to Idaho Industries and then to Ore-Ida Foods. Finally, the BLM, even without knowledge of the assignment of the water permits, rejected all the applications to enter.

In February of 1963 Golden Grigg found another area of public land which he and Vanness Anderson considered suitable for development. On February 22, 1963, eight persons related to the Grigg side of the Grigg and Anderson partnership, and six persons from the Anderson side drove to the Black Mesa area to "view" the land. Apparently the purpose of the trip was to enable the entrymen to swear that they had inspected the land, since the application to enter requires each applicant to state:

> 6. I CERTIFY that on (date)__, I made a personal on-the-ground examination of every legal subdivision of the above-described land to the extent necessary to assure me that the lands applied for:
>
> a. Are essentially nonmineral lands, and to the best of my knowledge there is not within the limits of any of the legal subdivisions applied for, any vein or lode of quartz or

> other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, nor any other valuable mineral deposit, salt deposit, or salt springs, except as follows * * *.
>
> b. Are not worked for minerals during any part of the year by any person or persons except * * *.

At best the "on-the-ground examination" of the land can be described as cursory.

With perhaps one exception, Golden Grigg, none of the entrymen knew which tract he would be applying for. The actual survey and plotting of the various parcels of land had already been accomplished by Harley McDowell of Idaho Land and Appraisal. After the inspection of the Black Mesa area, the group of entrymen gathered at a nearby restaurant where Harley McDowell's secretary filled out the applications for entry of the desert land, which they signed. On that same day, February 22, 1963, on instructions from Golden Grigg, a check in the amount of $3,035 was drafted on the account of Grigg and Anderson Farms and made payable to Idaho Land and Appraisal (Tr. 2806; 3084). The entrymen made no payment at this time.

Golden Grigg testified that he insisted on being given an entry in the center of the land:

Q. Did you feel that you were entitled to determine who would be the entrymen on several of the tracts?

A. I don't think that I did, I think that actually we told them approximately what the deal was, that I did want the center, and outside of that I think it was more or less done by Harley's office, and Newcomb, and maybe myself, but I don't really remember the details of whoever it was, they was anxious enough to get a piece of land that there wasn't any argument about it.

(Tr. 853)

Otis Williams testified that he had been given no choice in the selection of his designated entry (except that he didn't have to take the entry if he didn't want it). He said, however, that he thought that if he had protested being given that entry he could have had a choice, "being in one of the Grigg and Andersons." (Tr. 2002.) Otis Williams is one of the partners in Grigg and Anderson Farms. This speculation that the partnership would probably have given a preference to one of partners to select a different entry indicates that it was the partnership, not the entrymen, which controlled who got what.

Paul Hogg and his wife, Lu Ann, each got entries. Paul Hogg testified that in January of 1965 he was employed by Ore-Ida Foods at a salary of less than $7,000 per annum, that his wife was not employed, they did not own or rent their own house but resided rent-free in a house owned by his father-in-law, that his net worth was

not "what you would call substantial," and yet this arrangement with Grigg and Anderson Farms afforded him the opportunity to contract a personal obligation amounting to nearly $72,000 just for his share of the main irrigation system (Tr. 2454-57). Nevertheless, he testified that had he not the advantage of the Grigg and Anderson deal he could have financed the land clearing and leveling from outside sources and purchased his sprinkler pipe on a conditional sales contract after making a substantial down payment (Tr. 2452).

All of the applicants had the impression that the Grigg and Anderson partnership would develop the lands and handle all the details necessary for the allowance of the entries.

For example, Fred Baines testified that he assumed a corporation would develop the entries:

Q. So why did you feel it was necessary to engage some other corporation to do it?

A. Because we didn't as entrymen, individuals, didn't have anything to do it with, and we thought our dads and so on could.

Q. That had been the understanding from the beginning had it not from the time you filed your application.

A. For them to develop the project?

Q. Yes.

A. Yes.

(Tr. 267)

Bonnie Anderson testified as follows:

Q. Now at the time of this trip, do you recall whether there was any consideration given to whether the Grigg and Anderson co-partnership was interested in this Black Mesa project?

A. Well, I don't know that it was voiced, but I think we all assumed.

Q. I see. They had been involved in developing land for some time, as I understand it?

A. Yes.

(Tr. 426)

Lu Ann Hogg testified to the same effect:

Q. Has your father [Vanness Anderson] helped you throughout the development of your entry?

A. Yes.

Q. Have you looked to him primarily to see that everything was done on your entry that needed to be done?

A. Yes.

Q. And did you realize that the development work on the land has been done by the Grigg and Anderson partnership?

A. Well, I left that more or less up to my father as him being one of the partners.

(Tr. 710)

In short the entrymen assumed that everything that had to be done to perfect the entries would be taken care of by the Grigg and Anderson partnership, including handling all contact with the BLM, clearing the land, developing the irrigation system, farming, marketing, and accounting for costs and proceeds and disbursing funds.

Subsequently, the applications for entry were filed with the BLM on February 25 and 27, 1963, by the Idaho Land and Appraisal Service. At the same time, Harley McDowell began work to obtain water permits from the State of Idaho.

After the meeting between officials of the BLM on March 5, 1963, attorney William Ringert was directed to prepare documents showing the organization of the Cottonwood Mutual Canal Company. Mr. Ringert prepared the mortgage agreements between each entryman and the Cottonwood Mutual Canal Company. He was paid by the Grigg and Anderson partnership.

An employee of Idaho Land and Appraisal Service prepared the economic and engineering feasibility report. As previously noted,

the report called for an open ditch gravity system to irrigate 13 of the 14 entries. It is clear that the sole purpose of the feasibility report was to induce the BLM to allow the entries. The planned development was supposedly a joint project of the individual entrymen. In fact, none of the entrymen were familiar with the report or with any part of the proposed plan. Golden Grigg testified that he had never intended to use the plan contained in the report to develop the land.

> Q. Well, is it true sir that you never then adopted that feasibility report as your own?
>
> A. Well, I guess I didn't read it that close.
>
> Q. Did you read it at all?
>
> A. I doubt it. But when the closed system came up after Sailor Creek came in Bud recommended that we change it. I am saying that there was never a gravity intention on Black Mesa, it wouldn't have been practical * * *.
>
> (Tr. 1320)

Harley McDowell, who was ultimately responsible for the preparation of the report, testified that the feasibility report was "purely a paper plan to satisfy the Bureau." (Tr. 3083.) Idaho Land and Appraisal Service was paid for its work in producing the plan by the Grigg and Anderson partnership. Idaho Land and Appraisal Service was also paid by the Grigg and Anderson partnership for the

payment submitted to the BLM as reimbursement pay for range improvements.

After the entries were allowed in February of 1964, work began in earnest to put the land into actual production. However, it was not until March of 1965 that the BLM had any knowledge that the entrymen were not the real parties in interest.

Golden Grigg and Vanness Anderson hired G. T. "Bud" Newcomb to design and build the irrigation system. The work was begun in the fall of 1964 and was completed by April of 1965. As of December 31, 1965, development costs had exceeded $1,400,000.

The actual system was not an open-ditch gravity system; the entire system utilized closed-pipes and sprinkler laterals. The system was laid out in the most efficient way to irrigate the project as one large farm -- a way which ignored the separate irrigation of each individual entry. Although the contestees assert that the system can be converted to serve the individual entries, contestant's witnesses maintain that this would not be feasible. Mr. Newcomb was paid for his work by Vanness Anderson and by the Grigg and Anderson partnership.

Vanness Anderson also hired Mr. George Lake to prepare the land for farming and to construct support facilities for the operation.

The support facilities include ten large potato cellars, a machine shop, and a labor camp necessary for pipe movers. The entrymen took no part in either the making of the decisions or in the actual work. Mr. Lake was paid for his services by the Grigg and Anderson partnership.

The money actually used to pay for the development expenses was obtained by Vanness Anderson from the U.S. National Bank of Oregon. The money was loaned largely on the financial strength of the Grigg and Anderson partnership.

On January 29, 1965, three different agreements were signed by each of the entrymen: 1) a "Construction Contract" providing for the construction of the irrigation system, 2) a "Land Development Agreement" providing for the complete preparation of the soil for planting crops, and 3) a "Farm Operating Agreement" providing for the farming of all of the entries by the Grigg and Anderson partnership.

The thrust of the "Construction Contract" was that the Grigg and Anderson partnership, rather than the Cottonwood Mutual Canal Company, would construct the irrigation system. The original mortgage and subscription agreements between the canal company and the entrymen were canceled, notwithstanding that these were the agreements

the BLM had relied on in allowing the entries. For construction of the system the entrymen agreed to pay the partnership $225 per acre in 15 equal, annual installments. Each entryman gave, as security for the payments, a promissory note, a mortgage on his lands, and a pledge of his stock in the canal company, which still owned the water permits. William Ringert, the attorney who prepared the agreements, testified that one of the primary reasons for the change was that no one could take advantage of the tax investment credit for the system if it were owned by the canal company. (Tr. 4254.) Conveniently enough, the Grigg and Anderson partnership "had a tax problem" and were the only ones who "needed" the tax investment credit (Tr. 1252).

The second agreement signed by the entrymen on January 29, 1965, was a "Land Development Agreement" which provided that the Grigg and Anderson partnership would completely prepare the land in each entry for planting. The entrymen were to pay for the development work in 15 equal, annual installments.

The third agreement entered into by the entrymen and the Grigg and Anderson partnership on January 29, 1965, was a "Farm Operating Agreement". The agreement provided that the partnership would farm the land for a period of approximately ten years. The partnership would pay all of the expenses of farming and the entrymen were to

receive annual rental payments in return. The partnership was granted the right to construct and retain ownership of permanent improvements, such as buildings. Finally, the partnership was granted a ten-year lease on the irrigation system in order to be eligible for the tax investment credit attributable to the system.

The amount of the annual rental payment that each entryman was to receive under the Farm Operating Agreements was approximately equal to the amount of his payment under the Construction Contract and Land Development Agreement plus enough for each entryman to pay his increased taxes.

The combined result of the three agreements was the shifting of all possession, control and nearly all benefit of the entries from the individual entrymen to the Grigg and Anderson partnership; that is, the paper agreements finally reflected the true relationship between the partnership and the entrymen. It is clear that the agreements were based on the needs and desires of the partnership; the agreements were drawn up at the direction of Golden Grigg for the benefit of the partnership and presented to the entrymen for their signatures.

The subsequent course of conduct between the partnership and the entrymen can only be considered consistent with the finding that at every step of the operation the partnership exercised total

control and possession of the entries and received nearly all, if not all, of the benefits of the land. For example, there can be no doubt that from the time of inception, or very shortly thereafter, the partnership formed the intention to farm these entries for a minimum period of ten years, as set forth in the operating agreements. The evidence strongly indicates that the partnership never altered this intention prior to submission of the final proofs. Their attorney, appearing as a witness, testified that after reviewing an opinion by the Solicitor of this Department written in April 1965 (72 I.D. 156), he reacted as follows:

> In a telephone conversation * * * I advised them to cancel the operating agreements. My advice to them was to just cancel those ten years operating agreements, and proceed on a year to year basis under essentially the same terms that you got set out in that ten-year operating agreement.
>
> (Tr. 4260)

This cancellation of the formal agreements does not in any way suggest an alteration of the intent of the partnership to proceed with the program as planned. It only suggests that they deemed it necessary to alter the formal expression of that intent.

In order to compensate for the loss of the tax investment credit on the irrigation system, which occurred as a result of canceling the ten-year farm operating agreement, the partnership

increased the amount of the annual payments to the entrymen, thus creating larger deductions for the partnership. The entrymen were then able to take the investment credit.

The actual farming operations also reflect complete control by the partnership. In 1965 and 1966 all of the entries were planted in potatoes. It is clear that the partnership did so for the benefit of Ore-Ida Foods, Inc., a large, potato processing corporation controlled by the Grigg and Anderson partnership. Golden Grigg testified to that effect at the hearing:

> Q. Well, in any case your potato procurement operations would ordinarily result in a profit at least to the Ore-Ida Foods would it not?
>
> A. I could explain a little bit my ideas if you want to hear them.
>
> Q. I would appreciate that sir.
>
> A. All right. We found out, and I have found out since, that to deal with people that you can depend on [for] large amounts of potatoes is very healthy. In other words, let's take '65 for instance. Grigg and Anderson and Anderson Brothers is almost the only people that delivered their potatoes to Ore-Ida for what they were contracted for. They went up to $8.00 or $10.00 a hundred, do you think a farmer is going to deliver that kind of potato for a buck, hell no he ain't.
>
> Q. They would just withhold the potatoes?
>
> A. Yes, they would lock the cellar on you.
>
> Q. Well --
>
> A. We have used a million sacks of potatoes and we need

these huge amounts of potatoes that we knew we was going to get. We was selling against them.

Q. Well it was then to Ore-Ida's benefit I take it [to] deal with what they considered to be the reliable Grigg and Anderson partnership?

A. That is right.

Q. Well of course the partnership had a motive in being reliable in that the partners were themselves shareholders in the Ore-Ida Foods?

A. That is right.

(Tr. 820, 821)

Nevertheless, even at the prices paid by Ore-Ida (which apparently were substantially below the price being paid for potatoes on the open market), the gross proceeds from the potato crop on the project was approximately $1,600,000 in 1965, and nearly that much in 1966 (Tr. 372).

In 1967 and 1968 the farming operations were split between the Grigg faction and the Anderson faction of the partnership, presumably due to a dispute between Golden Grigg and Vanness Anderson. The farming operations were split in half, even though there were eight entrymen in the Grigg faction and only six in the Anderson faction. The Grigg faction farmed the north half of the area including the entry of Lu Ann Hogg, who was related to the Anderson faction. The Anderson faction farmed the south half which included the entries of both Charles and Lovell Taylor, who were related to members of

the Grigg partnership. Clearly, the division of lands was made on the basis of the interest in the land held by each faction in the partnership, and not on the basis of tracts held by the individual entrymen, or their family affiliation.

In 1968, after the partnership had transferred control of Ore-Ida Foods, Inc., potatoes were sold for the first time to other buyers. In 1969 all of the entries were again farmed as one unit. However, due to a bad farming year, the payments from the partnership to the entrymen were drastically reduced. In fact, the schedule of payments called for in the Farm Operating Agreement was largely ignored. At the end of each year, the entrymen were called into the Grigg and Anderson partnership offices. The partnership's accountant and bookkeeper were both present. They had already determined how much each entryman was to receive and how much he would be required to pay back. None of the entrymen were aware of the basis for the payments. Essentially, each one received enough money to pay for his promissory notes plus enough to pay his increased taxes. A "nominal" amount was added for "spending money," or as Golden Grigg so succinctly stated the proposition, "* * * we leave them enough to pay their taxes, and maybe buy an ice cream cone." (Tr. 895.)

In the summer of 1965, after crops had been planted, but before they had been harvested, each of the entrymen was paid an advance

of $1,500 by the Grigg and Anderson partnership. However, it is clear from the testimony that the money was advanced to each entryman to cover the checks which each entryman had already issued to the partnership to show compliance with the provision of the desert land law, which requires the payment by each entryman of $3 per acre on improvements. The partnership did not deposit the entrymen's checks until two weeks later, after it advanced each entryman enough to cover those checks. Clearly, the entrymen's payments to the partnership were a sham to convince the BLM that each entryman had complied with the law.

When Jack Anderson was killed and his widow assigned their two entries, it was the partnership which paid her the $4,000 consideration -- not the assignees. After Thomas Anderson took the assignment of one of the entries he went up and looked at the project, but he testified that he did not know which entry was his, or where it lay in the project. He only knew he had 320 acres. (Tr. 491.)

The evidence may be summarized as follows. First, at no time did the entrymen have possession of their entries. Second, at no time did the entrymen exercise any control over any operations regarding their entries. Third, at no time did the entrymen have any influence on decisions regarding what tract(s) he was to receive, the terms of the various agreements with the Grigg and Anderson

partnership, or the amount of compensation he was to receive from the farming operations. Fourth, at most, the entrymen received 20 percent of the gross proceeds of some crops, except when the partnership decided the entrymen should have less. It is not clear whether even that benefit was real or merely a paper benefit, since the partnership consistently ignored the terms of the various agreements when it found it convenient to do so. Fifth, the applications and representations to the BLM were made for the purpose of inducing action favorable to the entrymen. In fact, there was little relation between representations made to the BLM and the actions of the entrymen. Sixth, the entrymen never made any out-of-pocket investment of their own funds. All money which they expended in the course of filing, planning and developing the entries was provided them by the partnership.

Perhaps the most striking feature of the entrymen's testimony is the lack of any real knowledge of or interest in the entries from the initial "inspection" of the lands to the time of the hearing. While each entryman stated at the hearing that he hoped to obtain the land in his entry, each one also testified that he had done virtually nothing to further that hope, except to sign the documents and draw the checks in accordance with the instructions of the partnership. Each entryman's knowledge of his own entry was so sketchy

that seven years after the entries had been made one entryman, Lu Ann Hogg, couldn't state whether the entry was "square" (It was an eight-sided polygon.), or even whether the entry was fenced (It was.). (Tr. 718, Ex. G-6.) Another entryman, Thomas Anderson, couldn't recall whether there were any houses on his entry (There were.). (Tr. 453, Ex. G-7.) Another entryman, Fred Baines, testified that at the time he made his application he didn't even know for sure where his particular entry was, and only learned where it was from the legal description on the application form. He did not know then how it should be irrigated, and even at the time of the hearing he could not say whether there had been any leveling of the land on his entry. (Tr. 1785.) The entrymen displayed no interest in the terms of the various agreements with the partnership, nor in the kind of crops grown on the entries, nor in the basis used to calculate the annual crop payments. In short, the entrymen evinced a near-absolute lack of familiarity with matters relative to their entries, and even an absence of any curiosity concerning them. Indeed, one of the few things that any of the entrymen could testify to with any certainty was the authenticity of their signatures on the various documents, though, their recollection of the circumstances surrounding their signing remained consistently vague.

[1] The basic legal issue presented in this appeal is whether the Grigg and Anderson partnership held more than 320 acres by assignment or otherwise before the issuance of patent, in violation of

43 U.S.C. § 329 (1970). Administrative Law Judge Robert W. Mesch found that, in fact, the partnership had held all of the entries by means other than assignment. (Dec. 36.) The appellants have attacked that conclusion by arguing that the purpose of the limitation prohibiting holding of more than 320 acres was to prevent any person or group of persons from acquiring title to more than 320 acres of desert land; appellants argue that even if the Grigg and Anderson partnership had possession and control of the entries, and received the lion's share of the benefits of these entries, facts which they deny, such facts would be irrelevant since at no time did the partnership attempt or intend to obtain title to the entries. Appellants further assert that in the light of what they perceive to be the purpose of the 1891 amendment, that is, to prevent acquisition of title, the phrase "by assignment or otherwise" should be construed to mean by assignment or means tantamount to assignment. Appellants urge that this Board apply the rule of "ejusdem generis" in so defining the word "otherwise."

The word "hold" is not free from ambiguity. For instance, Black's Law Dictionary gives several definitions of the word, which, for the purposes of this case, could result in differing legal conclusions:

> To possess in virtue of a lawful title; as in the expression, common in grants, "to have and to hold," or in that applied to notes, "the owner and holder." (citation omitted).

> To be the grantee or tenant of another; to take or have an estate from another. Properly, to have an estate on condition of paying rent, or performing service.
>
> * * * * * * * *
>
> To possess; to occupy; to be in possession and administration of; as to hold office.
>
> To keep; to retain; to maintain possession of or authority over. (citation omitted.)

Black's Law Dictionary, 864 (4th ed. rev. 1968). See also 19A Words and Phrases 186 (Perm. Ed. 1920); 40 C.J.S. Hold (1944).

We agree with the appellants that it is proper to examine the history of the desert land laws in order to ascertain the meaning of the phrase "hold by assignment or otherwise." As Justice Holmes once stated, "A page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

The Desert Land Act of 1877, 19 Stat. 377, provided that one who was a citizen or intended to become a citizen could enter and obtain title to 640 acres of desert land. That the Act had dual purposes is clear. Those purposes included both the reclamation and settlement of the land. The report of the Senate's Committee on Public Lands is instructive on this point. It states in part:

> Experience has shown that the homestead and pre-emption laws afford no means of acquiring title to desert lands. Those laws require settlement and occupation as a pre-requisite. Neither settlement nor occupation is possible without water. Irrigation must precede the settlement. But this is expensive, and settlers upon the public lands are unwilling to construct the necessary ditches and canals to irrigate lands to which they have no title and no certainty of obtaining title.
>
> It has been suggested that these lands be sold in large quantities in order to induce private capital to undertake the work of their reclamation. Your committee fear that any system of sale whereby the title would pass before irrigation would encourage speculation without inducing settlement. * * *

5 Cong. Rec. 1965 (1877).

Clearly, the Committee's Report is concerned with both reclamation of the lands and with settlement of the lands. Those concerns were also expressed in the Senate debate on the bill. One fear that was expressed by several senators in the debate was that a small number of people could hold a large area of desert lands without developing them and at the same time exclude bona fide settlers from making entry. For example, during the debate Senator Chaffee stated that:

> * * * Five or six individuals can locate as many miles square of land as they may select in any valley of any state or territory named in the third section of this bill, and hold that land for three years without doing any work at all. There is nothing in the bill to prevent them from filing another declaration, at the end of another three years, and in that way they can exclude this land from location for all time, thus preventing

bona fide settlers from occupying and purchasing it under our present system. * * *

5 Cong Rec. 1965 (1877).

Almost immediate abuse of the Act became commonplace. Large syndicates would purchase assignments of individual entries on a wholesale basis. For example, Representative Vandever of California, in an 1888 House debate, stated:

> This desert-land act was passed on the 3rd day March 1877. Within sixty days from the time of the passage of the act, in the district I represent, in upper San Joaquin valley nearly 400,000 acres of land were located upon under the provisions of the act, and almost immediately the parties who made the location transferred and assigned the land to other parties. Today the land is held by a syndicate that has never paid but 25 cents an acre for the land. The parties who made the location were dummies. * * *
>
> Many of these lands that are so held under the desert-land entries of eleven years ago today to the actual settlers would be worth a thousand dollars an acre, and yet they are called desert lands. * * * The act of the 3rd of March, 1877 provides specifically that the person making the settlement must make it for himself alone; but the law has been so perverted that the syndicate to which I have referred have held nearly 400,000 acres of land.
>
> * * * * * * * *
>
> * * * The great point is that we want the 300,000 acres thus suspended restored to the public domain, so that the honest settler may have an opportunity of going upon it and getting a homestead.

19 Cong. Rec. 5571-72 (1888).

Apparently, between 1877 and 1880 local land offices had permitted assignments based upon statements contained in Circular Instructions of March 12, 1877, 2 Copp's Land Laws 1375 (1882). While the instructions themselves did not mention assignments, the sample of the sworn oath required of each entryman contained the following paragraph:

> It is, therefore, further certified, that if within three years from the date hereof the said ___, or his assignee or legal representative, shall satisfactorily prove that the said land has been reclaimed by carrying water thereon, and shall pay to the Receiver the additional sum of one dollar per acre for the land above described, he or they shall be entitled to receive a patent therefor under the provisions of the said act. (Emphasis added.)

2 Copp's Land Law 1376.

But in 1880 the Department ruled that there was no authority in the Desert Land Act for permitting assignments. S. W. Downey, 2 Copp's Land Laws 1381 (1882). This ruling was subsequently modified by Secretary Teller in 1884. The Secretary held that assignments made between March 12, 1877, and April 15, 1880, would be recognized, but with one important limitation -- no person could acquire by entry or assignment more than 640 acres. David B. Dole, 3 L.D. 214, 216 (1884).

In 1887 the Department issued instructions which stated in part:

> 2. Desert land entries are not assignable, and the transfer of such entries whether by deed, contract or entry, vitiates the entry. An entry made in the interest or for the benefit of any other person, firm or corporation or with intent that the title shall be conveyed to any other person, firm or corporation is illegal. (Emphasis added.)

Circular, 5 L.D. 708, 9 (1887).

Thus, it is clear that even then the Department forbade entries which were made either with the intent to pass title to a third party or to endow a third party with some other interest or benefit.

In 1890 Congress amended several of the public land laws, including the Desert Land Act, to provide that no person could acquire title to more than 320 acres of public land. Act of August 30, 1890, 26 Stat. 391, as amended, 43 U.S.C. § 212 (1970).

In 1891 Congress further amended the Desert Land Act by providing that while assignments of entries could be made

> * * * no person or association or persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands * * *. (Emphasis added.)

Act of March 3, 1891, 26 Stat. 1096, as amended, 43 U.S.C. § 329 (1970).

Finally, in 1908 Congress further amended the Desert Land Act to provide that:

> No assignment after March 28, 1908, of an entry * * * shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said sections of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

Act of March 28, 1908, 35 Stat. 52, as amended, 43 U.S.C. § 324 (1970).

It is clear that Congress was concerned that land actually be available to bona fide settlers. There are two basic methods by which that Congressional will could have been thwarted. First, large syndicates could take assignments from dummy entrymen and eventually acquire absolute title to the lands. This was prevented by the 1890 amendment which provided that no one could acquire title to more than 320 acres of public land, 43 U.S.C. § 212 (1970). Second, the syndicate could hold desert lands in the name of dummy entrymen without ever receiving title, but at the same time using the land for its own benefit and preventing bona fide settlers from making entry. This was prevented by the 1891 amendment which provided that one could not hold by assignment or otherwise, prior to the issuance of patent, more than 320 acres of public land. 43 U.S.C.

§ 329 (1970). It is true that prohibiting holding prior to the issuance of patent will in many cases prevent the acquisition of title to more than 320 acres of land. But to suggest that preventing the acquisition of title is the only purpose of the 1891 amendment is to suggest that Congress engaged in a futile and redundant act when it approved the 1891 amendment, for it had prohibited such acquisition of title only one year earlier in very precise terms. Indeed, the very fact that Congress used much broader language only one year later is indicative of a different purpose. What Congress feared was the control of large areas of desert lands by a few men to the exclusion of bona fide settlers. We conclude that "holding" means occupying, possessing, controlling, or receiving the major benefits from a desert land entry in such manner that both bona fide settlers and the entrymen of record are precluded from occupying, possessing, controlling, or receiving the major benefits of the entry before the issuance of patent. United States v. Shearman, 73 I.D. 386, 427, 428 (1966); Solicitor's Opinion, 72 I.D. 156, 166 (1965). We further conclude that the use of the phrase "by assignment or otherwise" lends emphasis to our conclusion that the 1891 amendment is remedial in nature and should be construed broadly to achieve that objective. 2/ The word "otherwise" is nearly uniformly defined to mean "in a different manner; in another way, or in other ways." Black's Law Dictionary 1253 (4th ed. rev. 1968). Webster's New

2/ See 73 Am. Jur. 2d. Statutes, §§ 145, 153, 154, 157.

International Dictionary 1729 (2d ed. 1949). While this Department has recognized and applied the rule of ejusdem generis, it is completely inappropriate in this case. Black's Law Dictionary defines "ejusdem generis" in the following way:

> Of the same kind, class, or nature.
>
> In the construction of laws, wills, and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned (citations omitted). The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention.

Black's Law Dictionary 608 (4th ed. rev. 1968).

The very use of the word "otherwise" manifests an intention to prohibit the holding of desert lands by assignment or by any other means. It is by definition, a word of inclusion, not a word of limitation.

We conclude that the phrase "hold by assignment or otherwise" means to possess, occupy, control, or receive the major benefit from desert lands by assignment or by any other means which will prevent either bona fide settlers or the entrymen of record from possessing,

occupying, controlling or receiving the major benefits from desert lands. 3/ United States v. Law, 18 IBLA 249, 260; 81 I.D. 794 (1974); United States v. Shearman, supra.

Appellants argue, however, that precedent of this Department not only precludes this Board from reaching this conclusion, but also supports their argument that the phrase "hold by assignment or otherwise" was intended only to prevent acquisition of title to more than 320 acres. We disagree. As we have seen, one of the concerns of the Congress was to prevent syndicates from controlling large parcels of public land for their own benefit even without gaining title. Most of the cases cited deal with the validity of assignments made before the issuance of patent. In deciding those cases the Department stated that the prohibition against holding more than 320 acres by assignment or otherwise would prevent one from acquiring title or the benefits of title by agreements, secret or otherwise, to assign the entry either before or upon the issuance of patent. That statement of the law is, of course, quite correct, but it in no way suggests that it

3/ Appellants have submitted several other arguments which seem to draw distinctions where none exist. For example, at pages 7 and 8 of appellants' reply brief to appellee's answer brief, we find the following assertion:

> One does not hold under the Desert Land Law unless he has obtained, or is in a position to obtain, the entire interest of the entryman of record, for if he has not obtained the entire interest of the entryman, he is holding under the entryman, and not under the Desert Land Law.

is permissible to control desert land entries by means other than assignment. For example, in Silsbee Town Company, 34 L.D. 430 (1906), a case that arose before the 1908 amendments prohibiting corporations from holding entries, a corporation had made entry and filed an application to purchase desert lands. The Commissioner of the General Land Office had required the corporation to demonstrate that the individual stockholders were each qualified in their own right to make entry. Appellants cite the following language from that case to demonstrate that the 1891 amendment prohibited only the acquisition of title to more than 320 acres of desert land:

> The language of the act under which the application in question was made, touching the right of the applicant to take or hold land under its provisions, is plain:
>
> > but no person or association of persons shall hold, by assignment or otherwise prior to the issuance of patent, more than three hundred and twenty acres of such arid or desert land. (Sec. 7, act March 3, 1891, 26 Stat., 1095.)
>
> * * * * * * * *
>
> The language quoted clearly discloses the legislative intent that no person or association of persons shall obtain the benefit incident to the acquisition of title to more than 320 acres of land under the desert-land law, and it was not the intention to permit a person to exercise directly, in an individual capacity, the

> benefit conferred, and in addition, obtain a like benefit, by the indirect exercise of the same right through the instrumentality of a legal fiction. * * *

34 L.D. at 431; appellants' brief at 21.

The Secretary, when he used the phrase "benefit incident to the acquisition of title" was simply making reference to the fact that the stockholders would have received the benefit incident to the acquisition of title, i.e., profit from the use of the land, and not the actual title. Actual title would have vested in the corporation. The Department's primary concern was not title, as such, but the "benefit incident to the acquisition of title," a concern which is consistent only with a broad interpretation of the 1891 amendment, and inconsistent with the narrow interpretation urged by the appellants.

Appellants have cited several other cases which deal with the same issue -- the validity of holding by assignment prior to the issue of patent. See, e.g., Heinzman v. Letroadec's Heirs, 28 L.D. 497 (1899); J. H. McKnight Company, 34 L.D. 443 (1906); Edmond A. Fogarty, 37 L.D. 567 (1909). While we regard the statements of law in those cases as correct, it is fairly clear that they are irrelevant to the issue of holding "otherwise" -- by means other than assignment.

There remain, however, two opinions of more recent vintage which the appellants have urged us to treat as overruled, Solicitor's Opinion, Idaho Desert Land Entries-Indian Hill Group, 72 I.D. 156 (1965), and the decision in United States v. Shearman, 73 I.D. 386 (1966). Both deal with the same cases. A large number of individuals had made entry on desert lands in Idaho. After they had given up the idea of attempting to reclaim the land on their own, the entrymen entered into agreements with a corporation, Hoodco, that gave Hoodco the right to possess and farm the entries for a period of 20 years. Each entrymen also agreed to sell his entry after patent for $10 per acre. 4/ The Director of the BLM dismissed contests against the entries by decision of August 14, 1964. The Solicitor for the Department of the Interior recommended to the Secretary that contest proceedings should be reinstituted. In that opinion, he stated:

> "Assignment," "hold" and "otherwise" are words of broad signification and their precise meanings depend on the context in which they are used. Sec. 1 of the act of March 3, 1877, supra, forbade entry of more than one tract by the same person. Sec. 5 of the act of March 3, 1891, speaks of the applicant for patent "or his assignors," and section 7 authorizes the issue of patent to the entryman "or his assigns." The 1891 Act removed the prohibition against assignment of desert land entries. United States v. Hammers, 221 U.S. 220 (1911). The acreage

4/ The facts in Shearman are set forth at length in both court and departmental decisions and need not be restated here.

> limitation provisions of the 1877 Act would be inadequate to prevent excess holdings under the 1891 Act. The intent of Congress to prevent excess holdings is manifested in section 7 of the 1891 Act which prohibits holdings in excess of 320 acres "by assignment or otherwise."
>
> It is not difficult to divine the congressional purpose in these statutes. Congress did not want holdings larger than 320 acres. We can construe the language used to effect that purpose without injury to the English language. The language of the statutes does not leave us powerless to prevent frustration of congressional purpose.
>
> The Brief of Contestees and the decision of the Director equate "assignment or otherwise" as "assignment." The language of the statute is said in the Director's Decision to be the same as a statement that no person may "by assignment or other arrangement tantamount to an assignment become in effect an entryman." Such a construction ignores the meaning of the word "hold" and disregards the usual meaning of the term "assignment or otherwise." 30 Words and Phrases, Perm. Ed., 500-501. This phrase is commonly found in the law and "otherwise" in the phrase means "in a different manner" or "in any other way." In re Perry's Will, 126 Misc. Rep. 616, 214 N.Y.S. 461, 463 (1926); In re Iwers' Estate, 225 Ia. 389, 280 N.W. 579 (1938).
>
> Even if the arrangements described do not amount to an assignment, Hoodco "holds otherwise," that is, in another manner, more than 320 acres, in violation of the statute.

72 I.D. at 166.

The Secretary accepted the Solicitor's recommendation and ordered that contest proceedings be reinstituted against the entries. After a hearing, the Secretary accepted a recommended

decision which found that each of the entries had been held by assignment:

> Assignment as used in sections 2 and 7 is, therefore, concluded to mean such interest or partial interest as will result in effective control of and benefit from the entry or entries. The acquisition of such interest constitutes a holding within the meaning of the statute. In this case, the right to possess, reclaim, farm, retain the farming proceeds and pledge the entries, gave Hoodco Farms complete dominion over the entries for a period of 20 years and constituted a prohibited assignment and holding in excess of 320 acres of desert land.

73 I.D. at 428.

The Secretary's decision was appealed to the District Court for the District of Idaho. In its preliminary decision the District Court reversed the Secretary on each point. Reed v. Hickel, Civil No. 1-65-87 (filed March 13, 1970). That decision was in turn appealed to Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the District Court on several points, sub nom. Reed v. Morton, 480 F.2d 634 (9th Cir. 1973), cert. denied, 414 U.S. 1064 (1973). The Court of Appeals stated:

> The detailed findings of fact were prepared by Hoodco, after the district court filed a memorandum finding generally in Hoodco's favor. Despite the great weight to be accorded findings made by a trier of fact upon disputed contentions of fact, we cannot escape the conclusion that the district court here gave undue weight to the substantial investment of Hoodco in developing the lands. The court erroneously estopped the government from asserting valid

> legal grounds for setting aside the fraudulent transactions by which Hoodco acquired the lands in question.

480 F.2d at 639.

The specific finding which the Court of Appeals overruled was the finding by the District Court that there had not been a secret agreement by the entrymen to convey their entries after they obtained patent. 480 F.2d at 640. The Court of Appeals did not deal directly with the Secretary's conclusion that Hoodco held in excess of 320 acres, except to note that the Secretary had made such a finding. Appellants urge us to follow the finding of the District Court on that point, since the Court of Appeals did not explicitly overruled it. We do not regard the District Court's decision as binding, since it is apparent that the Court of Appeals upheld the Secretary's opinion on nearly every point. Indeed, as the Court of Appeals noted in reaching its conclusion:

> * * * However quixotic it may seem at this late date to say so, Congress never intended bargain-price desert land to be provided for the benefit of corporations or large landholders. (Emphasis added.)

480 F.2d at 641-642.

Appellants have also pointed out that the Department of the Interior has permitted desert land entrymen to allow other parties (notably hired farmers or tenant farmers) to derive some benefit

from and to exercise control over their entries; consequently, appellants argue that holding "by assignment or otherwise" does not include their activities. Appellants further argue that since the Department cannot point out any one act which is in itself, illegal, they have not only not held the land in violation of the law, they have committed no fraud for which the entries could be canceled.

Since both arguments suffer from the same infirmity, we will deal with them together. It is, of course, true that the Department has stated that an entryman may mortgage his lands or even pay someone else to develop them. See, e.g., United States v. Shearman, supra at 426; Williams v. Kirk, 38 L.D. 429 (1910). A person may transfer most of his bundle of rights, known as property rights, to any number of people and still retain some interest in the property, as long as he retains some significant portion of that bundle of rights. This was the point made by Judge Mesch when he stated

> * * * Even in the most flagrant situation where an entryman is a "complete dummy" for an undisclosed principle, one would expect that the nominal entryman would receive something simply for providing the use of his name.

(Dec. at 36).

[2] Now in the case of the complete dummy, the right to receive some payment has been retained. At some point, however, a person

surrenders enough of his bundle of rights that the other party must be considered to "hold" the property. We have concluded that that point has been reached when the entryman, before the issuance of patent, surrenders possession, control, and most of the benefits of the entry. It is clear that possession, control, and benefits constitute nearly the whole bundle of rights known as property rights. It is also clear that an entryman can surrender part of the bundle of rights without surrendering control. This is the case of the mortgage. An entryman may also hire someone to develop the lands, perhaps for a share of the crop. By so doing he surrenders some benefit. Finally, as in the case of Williams v. Kirk, supra, an entryman may engage one person to develop the lands and another to develop the irrigation system without ever surrendering enough of the bundle of rights to any one person that anyone other than the entryman could be considered to hold the land prior to the issue of patent. But, in this case, the entrymen surrendered possession, control and most of the benefit of the entries to the Grigg and Anderson partnership prior to the issuance of patent. Therefore, even if the various arrangements between the Grigg and Anderson partnership were to be considered separately and found not to be in violation of the law, when all of the arrangements are considered together there is little doubt that they add up to

a holding by assignment or otherwise of more than 320 acres of desert lands 5/ prior to the issuance of patent.

Appellants also argue that the United States is estopped from asserting the invalidity of the entries, since they maintain they relied to their detriment on prior decisions of this Department in developing their entries. Appellants cite a decision made by the Director of the BLM in August 1964. That decision involved the Indian Hills development, and, as previously noted, was overruled by the Secretary in United States v. Shearman, supra, and by the Court of Appeals for the Ninth Circuit in Reed v. Morton, supra. There is no doubt that the arrangements between the entrymen and the partnership in this case would have been permitted under the Director's decision. Between August 1964 and April 1965, when the Secretary first indicated that the decision of the Director of the BLM was in error, the partnership began and substantially completed the work of developing the lands involved in this case.

For a number of reasons, however, the doctrine of estoppel is not appropriate in this case. First, the Government may not generally be estopped from attacking illegality, especially in the case of public lands. Reed v. Morton, supra; Utah Power & Light Co.

5/ We would suggest, however, that any agreement, such as a lease, which transfers possession, control, and substantial benefit for the entire statutory life of an entry will be considered a holding.

v. United States, 243 U.S. 389 (1917). Second, even if estoppel were appropriate in this kind of case, the doctrine would be unavailable to appellants because of their fraud in inducing the BLM to allow these entries. Judge Mesch stated the proposition very cogently:

> If a disclosure had been made to the Land Office that the individual entrymen were not the sole parties in interest and that the individual entrymen did not intend to reclaim the land for their own use and benefit, the Land Office could not properly have allowed the entries. The courts have consistently held that a failure to disclose facts, which, if disclosed, would result in a denial of a grant under the Public Land Laws renders the obtaining of the grant fraudulent. United States v. Trinidad Coal & Coking Company, 137 U.S. 160 (1890); United States v. Keitel, 211 U.S. 370 (1908). * * *

(Dec. at 47.)

This argument was advanced and rejected by this Board in the recent case styled United States v. Law, supra at 257.

The evidence discloses that entrymen cooperated with the Grigg and Anderson partnership in order to obtain the allowance of the entries. The entire project was made to appear as if it were entirely the plan of the entrymen and made solely in the interest of the entrymen. In fact, the plans submitted to the BLM to obtain allowance of the entries were completely ignored, once the entries were allowed.

Neither was the relationship between the partnership and the entrymen revealed until after the entries had been allowed and the development of the land was complete. If the BLM had known that the partnership was to possess, control, develop the lands, and receive the major benefits of the entries, it could not have allowed the entries, since the plans of the partnership called for holding the lands by assignment or otherwise prior to the issuance of patent.

Appellant argue that the change in plans with respect to the project was due to technical necessity. We agree that an entryman may change certain technical aspects of his plans. We also agree that the BLM might have approved the technical aspects of the new plan, had it been privy to such knowledge. But the BLM could not have approved of the legal arrangements of which that plan was a part, since those arrangements would have amounted to an illegal holding of the land prior to the issuance of patent. We join the Court of Appeals for the Ninth Circuit in quoting Justice Holmes, "it is evident * * * that all hands proceeded on the notion that if the entrymen put in a periodical appearance on the land they would get it, and that no one troubled himself about actual intent provided that the affidavits were in due form * * *." Jones v. United States, 258 U.S. 40, 48 (1922), cited in Reed v. Morton, supra at 640.

[3] It is quite obvious from all of the evidence that the nominal "entrymen," other than the partners, contributed nothing to the project except their identities. They did not select the land, or even formulate the idea to become desert land entrymen. They expended no capital of their own except that which was provided by the partnership. They were not personally involved in the conception, implementation, or execution of the plan, nor did they even understand fully their own roles in it. They were virtual puppets, responding almost mechanically and uncomprehendingly to the will and direction of the partnership. They were motivated by the partners' assurance that eventually, if they cooperated by following instructions, they would get title to a valuable tract of land, and they were secure in their faith that their close kin would not deliberately use them to their ultimate disadvantage.

In appellants' supplemental statement of reasons (at p. 125), with reference to the entrymen's assumption of financial liability, it is asserted, "This cannot mean anything except that the entrymen themselves reclaimed the lands in their entries; the partnership was merely the vehicle employed by them to accomplish that purpose." The vast bulk of the evidence convinces this Board that precisely the converse of that statement is more accurate, i.e., that the partnership reclaimed the lands in the entries and the entrymen were merely the means which the partnership employed to

accomplish that purpose. Desert land entries made for the use and benefit of others with intent to circumvent the provisions of the desert land laws must be regarded as fraudulent, and will be canceled.

This decision accords with our decision of even date herewith in United States v. Morris, 19 IBLA 350, 82 I.D. 146 (1975).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed and the entries are canceled.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Martin Ritvo
Administrative Judge